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Division III
State of Washington

No. 33988-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 15-1-00454-0

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State of Washington, Respondent

v.

Nicolas Mendoza Vera, Appellant

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# BRIEF OF RESPONDENT

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## I. STATEMENT OF THE ISSUES

1. Based on the Information being liberally construed in favor of validity post-verdict, did the Information adequately inform Mendoza Vera of the act(s) constituting the charge of luring when it omitted the intent mens rea that was nevertheless implied in the language, "attempt to lure"?
2. If intent was an element of the former luring crime, does the invited error doctrine bar Mendoza Vera from arguing that the to-convict and affirmative defense instructions were error when he proposed those same instructions?
3. Under the corpus delicti rule, was there corpus delicti for luring when (1) the victim was playing at the park with her sister and mother, (2) Mendoza Vera, a person unknown to the victim and her mother, showed interest in the victim, (3) Mendoza Vera and the victim disappeared from (the mother's) view for approximately 10 minutes without the mother knowing where they had went, and (4) Mendoza Vera subsequently appeared carrying the victim in front of a house outside of the park that the victim was originally playing in?
4. Was there reversible prosecutorial misconduct when (1) the prosecutor never injected a personal opinion into his argument but rather

questioned Mendoza Vera's story in light of the evidence to the contrary, and (2) the comment was never objected to?

5. Under CrR 7.8, did the sentencing court have authority to resentence Mendoza Vera when it found the original judgment was void due to an erroneous term of community custody?

6. Is the "particularly vulnerable" aggravating factor unconstitutionally vague when (1) multiple cases have held it is not unconstitutionally vague and (2) vagueness challenges generally do not apply to sentencing schemes?

## II. STATEMENT OF THE CASE

A. Statement of Facts

Gricelda Zamora (victim's mother) testified that she was at a local park with her seven year old daughter and four year old daughter (K.P., the victim) to play. 1RP 44-47. The two daughters went to the play area in the park, and Zamora said that although she couldn't view Cashmere Street, she did have a view of the play area. 1RP 47. After playing for about five minutes, K.P. returned to the table her mother was at and drank some water (before returning to the play area to play); this happened three times. 1RP 48.

Nicolas Mendoza Vera approached Zamora and asked if K.P. was her daughter; Zamora confirmed K.P. was her daughter and asked Mendoza Vera why he wanted to know to which he simply said, "That's all." RP 49.

Subsequently, Zamora called for the girls to return to the table to eat donuts, but only her seven year old daughter returned. 1RP 50. Zamora and her daughter attempted to call K.P. and looked around for her but did not see her. 1RP 50. It had been approximately three to four minutes since she'd last seen K.P. 1RP 50. At this point, Zamora's boyfriend arrived and they started looking for K.P. throughout the park. 1RP 50. After speaking with a couple of people, Zamora continued her search by leaving the park and walking down Cashmere Street. 1RP 51. She eventually arrived in front of a house (on Cashmere Street) with a trampoline in the yard, but neither Mendoza Vera nor K.P. could be seen. 1RP 53-54. At this point, it'd been around eight or ten minutes since Zamora had last seen her daughter; Zamora became extremely concerned that (1) she would never see her daughter again, and that (2) her daughter was in great danger, so she called for help. 1RP 54.

As Zamora was calling for help, she happened to look up and see Mendoza Vera in front of the house with K.P. on his back. 1RP 55. Zamora had never given Mendoza Vera permission to take K.P. out of the

park (or anywhere for that matter), and Zamora had never seen Mendoza Vera before or ever allowed K.P. contact with him in the past. 1RP 56.

When K.P. first saw her mother, she appeared scared and cried out, "Mommy, Mommy!" 1RP 57. Zamora confronted Mendoza Vera and asked why he took her daughter. 1RP 55. Mendoza Vera responded that K.P. had asked him for some water, which Zamora immediately refuted. 1RP 55.

Eventually, the police arrived, and they located Mendoza Vera in one of the three houses on Cashmere Street. 1RP 71. Officer Nathan Hahn interviewed Mendoza Vera and Mendoza Vera provided the following rendition of events. Mendoza Vera was at a friend's house on Cashmere, but the friend was taking a shower, so Mendoza Vera went to the park. 1RP 84-85, 102-03. He headed toward the restroom and hung out at the playground for a few minutes. 1RP 85, 102-03. As he was leaving the park, K.P. asked for help, saying she could not find her mother. 1RP 85. Mendoza Vera decided to take K.P. back to one of the houses to play on the trampoline. 1RP 85. Mendoza Vera specified he grabbed K.P. by her hand and she went with him. 1RP 116. Mendoza Vera said K.P. was thirsty so he went inside the house to get her some water. 1RP 85. Friends inside the house told him to take K.P. back, which is what he was doing when he ran into Zamora on the street. 1RP 85.

B. Procedural History

The State charged Mendoza Vera with one count of luring with the aggravating factor that he knew or should have known the victim was particularly vulnerable. CP 8-9. A jury subsequently found Mendoza Vera guilty of luring as well as the aggravating factor. CP 62-63. The trial court initially sentenced Mendoza Vera to 364 days of confinement; the court also imposed an exceptional term of community custody of 48 months. CP 73-78. This appeal followed. CP 101.

While this appeal was pending, the court ruled that the original sentence was void because the court did not have authority to impose a community custody term; the court then resentenced Mendoza Vera to an exceptional 24 month term of confinement (with no community custody). 1RP 225; 2RP 34; CP 161, 167.

## III. ARGUMENT

A. The information sufficiently apprised Mendoza Vera of the charges despite not expressly including the word "intent."

When a challenge to the sufficiency of a charging document is made for the first time after verdict, the charging document must be construed liberally in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The information is sufficient if it can be understood therefrom "that the act or omission charged as the crime is clearly and

distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." RCW 10.37.050(6).

In *Kjorsvik*, the court held that an information alleging robbery was sufficient even though there was no language regarding the "intent" mens rea in it. *Kjorsvik* at 110. "It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money." *Id.*

Mendoza Vera's argument that the "intent" mens rea must be expressly included in the charging document has repeatedly been refuted in similar contexts. *See State v. Hopper*, 118 Wn.2d 151, 158, 822 P.2d 775 (1992) (holding that when construed liberally, the term "assault" impliedly includes the requisite mens rea); *State v. Tunney*, 129 Wn.2d 336, 340-41, 917 P.2d 95 (1996) (holding that the information was sufficient even though the mental element of knowledge regarding the victim's status (police officer) was not included in the information).

In the present case, the information was sufficient. The specific language of "intent" was unnecessary given (1) the liberal construction this court must view the information (based on the issue being raised for

the first time post-verdict) and (2) the term "unlawfully and feloniously attempt to lure" implies the intent element. In his brief, Mendoza Vera even concedes that intent is inherently implied in the luring language. *State v. Homan*, 191 Wn. App. 759, 777, 364 P.3d 839 (2015); Appellant Brief p. 10. As such, Mendoza Vera was sufficiently apprised of the charge of luring.

B. Even assuming intent was an essential element of the former luring statute, Mendoza Vera is barred from raising the issue under the invited error doctrine.

The State concurs with Mendoza Vera that there is a split in the Court of Appeals regarding the constitutionality of former RCW 9A.40.090, specifically pertaining to whether intent is an essential element of the crime of luring. *State v. Homan*, 191 Wn. App. 759 (2015); *State v. Dana*, 84 Wn. App. 166, 926 P.2d 344 (1996). Although the State does not concede that intent was an essential element of the former luring statute, even assuming there was error to begin with, it was invited error. When a defendant proposes an instruction identical to the instruction the trial court gave, the invited error doctrine bars an appellate court from reversing the conviction because of an error in that jury instruction. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Summers*, 107 Wn. App. 373, 381, 28 P.3d 780 (2001). The invited error doctrine applies even

if the to-convict instruction omits an essential element of the crime. *Id.* The invited error doctrine is a strict rule to be applied in every situation where the defendant's actions at least in part cause the error. *Id.*

Both Mendoza Vera's proposed to-convict instruction and the court's final to-convict instruction were materially identical and based on former WPIC 39.41; both instructions omitted any reference to intent. CP 40, 51. Because Mendoza Vera's proposed to-convict instruction omitted the intent element, and because the court's final to-convict instruction essentially followed Mendoza Vera's proposed instruction (as well as the State's), the invited error doctrine applies and Mendoza Vera is now barred from raising the issue and benefitting from an error he helped create.

In a similar vein, Mendoza Vera also argues that the jury instructions included an affirmative defense (lack of intent) instruction that improperly shifted the burden of proof to Mendoza Vera. Again, this argument relies on the assumption that intent was an essential element of the former luring statute. And again, even if there was an error, Mendoza Vera is barred from raising it under the invited error doctrine.

For clarification, the State concedes that if intent was an essential element of luring, then it was error to give a lack-of-intent affirmative defense instruction. However Mendoza Vera proposed an identical

affirmative defense instruction (based on former WPIC 19.02.01 and RCW 9A.40.090) to the one the court ultimately gave. CP 41, 53. The invited error doctrine again bars Mendoza Vera from raising (and benefiting from) and error he helped create.

C. Mendoza Vera's statements were properly admitted under the corpus delicti rule.

Under the Washington corpus delicti rule, evidence must independently corroborate or confirm a defendant's confession. *State v. Cardenas-Flores*, ___ Wn.3d ___, 2017 WL 3527499 (2017).

> [C]orpus delicti is, at heart, a rule of sufficiency. While corpus delicti also concerns admissibility, as modified by RCW 10.58.035, focusing on it as a rule of sufficiency prevents convictions based on uncorroborated confessions alone and furthers its purpose and practical values. Because corpus delicti pertains to sufficiency of the evidence, we conclude it can be addressed for the first time on appeal.

*Id.*

The independent evidence under corpus delicti need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. *Id.* It is sufficient if it prima facie establishes the corpus delicti. *Id.*; *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). Prima facie corroboration exists if the independent evidence supports a logical and reasonable inference of the facts the State seeks to prove. *State v. Brockob*, 159 Wn.2d 311, 327, 150 P.3d 59 (2006).

Specifically, corpus delicti involves two elements: (1) an injury or loss (2) caused by someone's criminal act. *Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986). While the State must establish the mental element of the crime beyond a reasonable doubt to sustain a conviction, mens rea is not required to satisfy corpus delicti. *Id.*

In the present case, there was corpus delicti. Mendoza Vera made it clear he was interested in K.P. when he asked Zamora about her. K.P. subsequently disappears for nearly 10 minutes at which time Zamora is frantically searching for her. Zamora finally sees K.P. reappear in front of a house that was outside the park and sitting on Mendoza Vera's back. Just seconds earlier, Zamora looked at the house's yard and trampoline and saw no sign of either Mendoza Vera or K.P. Just based on those facts alone, there is sufficient evidence Mendoza Vera lured K.P. out of the playing area, out of the park, and to an area that was obscured or inaccessible to the public. Zamora testified that she was standing in front of the house and saw neither Mendoza Vera nor K.P. and then shortly thereafter both appear in front of the house; this implies that Mendoza Vera and K.P. were either (1) in the house or (2) in another area of the property (e.g., the backyard) that was obscured from Zamora's view.

The luring is also corroborated by the witnesses' reaction to the appearance of K.P. at the house: Zamora is frightened that she may never

see her daughter again or that K.P. might be harmed; K.P. appears scared and cries out for her mother; and the occupants in the house Mendoza Vera goes inside immediately tell him to take K.P. back to the park.

With or without Mendoza Vera's statements, the evidence was clear he played a role in luring K.P. out of the park and to a location (possibly in the house or backyard) that was obscured or inaccessible to Zamora. As such, and consistent with the trial court's evidentiary ruling, there was corpus delicti for the crime of luring.

D. The prosecutor did not commit misconduct that affected Mendoza Vera's right to a fair trial.

> A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect . . . In determining whether prosecutorial misconduct occurred, we first evaluated whether the prosecuting attorney's comments were improper . . . If the prosecuting attorney's statement were improper, and the defendant made a proper objection to the statements, then we consider whether the statements prejudiced the jury . . . Prejudice is established only where there is a substantial likelihood the instances of misconduct affected the jury's verdict . . . Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice.

*State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010).

In the present case, the prosecutor's statement that "the State doesn't buy it" was not misconduct. 1RP 171. The prosecutor did not use the

pronoun "I" which Washington courts have found problematic due to the personal opinion inherent in it. More importantly, because no objection was made, the comment would not only have to be improper, but it must have been so flagrant or ill-intentioned that an instruction could not have cured the prejudice. In making the statement, the prosecutor appeared to simply be questioning the validity of Mendoza Vera's explanation for why he went to the house in light of the evidence. That was not improper and well within the State's right to rebut Mendoza Vera's argument.

E. The court had authority to resentence Mendoza Vera because the court originally imposed an erroneous term of custody.

A party may be relieved from a final judgment due to, inter alia, mistakes, excusable neglect or irregularity in obtaining the judgment, a void judgment, or any other reason justifying relief from the operation of the judgment. CrR 7.8(b). Although a sentencing court may not conduct a full resentencing when correcting ministerial errors, it may conduct a full resentencing when an erroneous judgment is vacated. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009).

Under CrR 7.8, the trial court has the express authority to amend its former judgment and has the power and the duty to correct an illegal or erroneous sentence; therefore, even if the trial court considers and rejects an exceptional sentence at the original sentencing, this exception allows

the trial court to consider and impose an exceptional sentence upon resentencing. *State v. Harvey*, 109 Wn. App. 157, 34 P.3d 850 (2001), *overruled on other grounds by State v. Thomas* 150 Wn.2d 666, 80 P.3d 168 (2003).

None of the cases cited by Mendoza Vera addressed either (1) CrR 7.8 or (2) barred a sentencing court from resentencing a defendant.[1]

In the present case, the trial court sentenced Mendoza Vera to an erroneous term of community custody. RCW 9.94A.702-03. Community custody and confinement are part and parcel of being in the State's custody. Both confinement and community custody are calculated together in ensuring a sentence does not exceed the statutory maximum. *State v. Bruch*, 182 Wn.2d 854, 858, 346 P.3d 724 (2015). And a defendant will receive credit (towards his confinement time) for any time served on community custody if his SSOSA or DOSA is revoked. *State v. Gartrell*, 138 Wn. App. 787, 791, 158 P.3d 636 (2007); *In re Postsentence Review of Bercier*, 178 Wn. App. 148, 151, 313 P.3d 491 (2013).

So when the court erroneously sentenced Mendoza Vera to 24 months of community custody, it ordered an erroneous term of custody, and therefore the community custody cannot be reexamined in a vacuum

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[1] *See State v. Eilts*, 94 Wn.2d 489, 617 P.2d 993 (1980); *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009) (discussed finality); *State v. Rowland*, 160 Wn. App. 316, 249 P.3d 635 (2011) (discussing finality); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980).

without also considering the corresponding term of confinement. In Mendoza Vera's case, the error wasn't simply ministerial; rather, the term of the sentence itself was fundamentally erroneous requiring the sentencing court to completely resentence him. As such, the court had authority to fully resentence Mendoza Vera.

F. The "particularly vulnerable" aggravator is constitutional.

In general, the void for vagueness doctrine does not generally apply to a sentencing scheme. *State v. Baldwin*, 150 Wn.2d 448, 458-59, 78 P.3d 1005 (2003). Aggravating factors such as "deliberate cruelty"[2] and "particularly vulnerable"[3] aggravating factors cannot be challenged on vagueness grounds. *Id.*; *State v. Mothershead*, 73634-5-I (Unpublished 2016) (holding that "*Baldwin* precludes Mothershead from challenging the 'deliberate cruelty' and 'particularly vulnerable' aggravating factors on vagueness grounds"); *State v. Graham*, 73107-6-I (Unpublished 2016) (holding that "Graham's vagueness challenge to the particularly vulnerable aggravating factors fails.").[4] These aggravating circumstances do not define conduct, authorize arrest, inform the public of criminal penalties, or vary legislatively defined criminal penalties. *Baldwin* at 458.

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[2] RCW 9.94A.535(3)(a).
[3] RCW 9.94A.535(3)(b).
[4] Pursuant to GR 14.1, *Graham* and *Mothershead* are unpublished opinions, have no precedential value, are not binding on the court, but may be accorded such persuasive value as the court deems appropriate.

Mendoza Vera cites a number of cases[5] to argue that *Baldwin* was incorrectly decided, but they all concern the right to a jury trial. *See State v. Kelley*, 168 Wn.2d 72, 81-82, 226 P.3d 773 (2010). The right to a jury trial is distinct from the vagueness doctrine that provides public notice and prevents arbitrary State intrusion. *Baldwin* at 458.

Mendoza Vera also argues that the particularly vulnerable aggravating factor is unconstitutionally vague because a jury has no frame of reference for a typical luring victim. Jurors readily understand the concept of vulnerability. *State v. Gordon*, 153 Wn. App. 516, 538, 223 P.3d 519 (2009) *reversed on other grounds in State v. Gordon*, 172 Wn.d 671, 260 P.3d 884 (2011). It is commonsense that age may play a role in vulnerability (i.e., a very young or very old victim). The State sees no discernable difference in applying the aggravating factor to the crime of luring versus other common contexts (assault, robbery, rape, etc.). What would make a victim particularly vulnerable in these more common contexts would apply equally to the crime of luring.

In conclusion, the particularly vulnerable aggravating factor is not unconstitutionally vague.

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[5] *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2131, 186 L. Ed. 2d 314 (2013); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

## IV. CONCLUSION

Based on the foregoing reasons, the court should affirm Mendoza Vera's conviction and sentence for luring.

DATED this 27 day of September, 2017

Respectfully submitted:

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Chelan County Prosecuting Attorney

By: Ryan S. Valaas WSBA #40695
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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| STATE OF WASHINGTON,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>NICOLAS MENDOZA VERA,<br><br>Defendant/Appellant. | No. 33988-2-III<br>Chelan Co. Superior Court No. 15-1-00454-0<br><br>DECLARATION OF SERVICE |

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 27th day of September, 2017, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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